Scotland in the Forefront of Property Law Reforms in the UK: Potential Implications for the Scottish People

GOODTIME CHIMNECHEREM OKARA*

ABSTRACT

The Scottish Government has taken steps to revolutionise its body of law on ‘trust and succession’ and housing. The recent Trusts and Succession (Scotland) Act 2024 has severely impacted the issues of appointment and removal of trustees, fiduciary duties of trustees, rights of beneficiaries, and Environmental, Social, and Governance (ESG) investments in Scotland; while the proposed new Housing (Scotland) Bill 2024 has the proclivity of influencing rent, rent control areas, eviction and homelessness in Scotland. Accordingly, this paper focuses on exploring the potential impacts of these legislative reforms on the lives of the Scottish people. Do they ‘make’ or ‘mar’ the proprietary rights of the Scottish people? Are all the provisions useful to Scotland’s rental market? Will the proposed ‘ask and act’ approach address homelessness in Scotland? This paper will also be important to jurisdictions that may intend to modernise their property law and housing regimes.

INTRODUCTION

Trusts and succession are of pivotal importance in modern-day society. Trusts regularly manage and protect proprietary and pecuniary wealth across generations. The recent Trusts and Succession (Scotland) Act 2024 signifies Scotland’s first centenarian review of its trust law. The Act which received Royal Assent on 30 January 2024, repeals and replaces many provisions relating to trusts and succession in the Trusts (Scotland) Act 1921. The Act seeks to reposition Scottish trust law with current and future societal and economic conditions and is bifurcated into two main Parts. Part 1 of the Act centres on Trusts, while Part 2 focuses on Succession. The succession changes which have implications on divorce, dissolution of marriage, annulment

* Lecturer in Law, School of Society and Culture, University of Plymouth, United Kingdom. E-mail: goodtime.okara@plymouth.ac.uk

1 Trusts and Succession (Scotland) Act 2024, asp 2 (hereinafter referred to as the 2024 Act).
2 ibid at chs 1 and 2.

© The Author(s) 2024. Published by Oxford University Press. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.
on special destinations (i.e. survivor’s right in a co-owned property), and succession of intestate estates came into effect on 30 April 2024, while the trust provisions are to come into effect on a date yet to be announced. One major reason for the delay regarding the commencement of the trust provisions is that the Scottish Government needs to seek a section 104 order concerning pension law, which is under the exclusive legislative powers of the UK Parliament.

Additionally, the Scottish Parliament is scrutinising the Housing (Scotland) Bill which aims to prevent homelessness and strengthen tenants’ rights in Scotland. The Bill once passed into law will have a tremendous impact on several areas of property law including rent, rent control, eviction procedures, and homelessness in Scotland.

Although, the Trusts and Housing regimes address different aspects of laws. They are juxtaposed in this article not only because of their timing but also because they would contribute to property law reforms in Scotland. Accordingly, this paper critically examines the above legislative reforms because of their attendant consequences on the proprietary rights of the Scottish people. It uses the provisions of the legislative reforms as a starting point for thinking about the likely effects on the Scottish people. It also offers insight into their potential impact and the future of property law and housing in Scotland. This awareness is of great importance to effectuate the notable provisions of these reforms and suggest further guidance to Scotland as well as other jurisdictions that may be desirous to innovate their laws in these regards.

**SALIENT THEMES IN THE TRUSTS AND SUCCESSION (SCOTLAND) ACT 2024**

The management of assets, investments, and property is one area in which trusts are utilised extensively. Despite the common misconception that only the wealthy can exercise trust, most people will eventually come into contact with one in some capacity. More so, certain types of policies are kept in a trust structure, such as life insurance and pension plans. The salient themes in the 2024 Act that will modify the practice of Trust Law in Scotland are the appointment and removal of trustees, trustees’ duty to provide information to beneficiaries, trustees’ decision-making and investment powers, and trustees’ standard of care. These themes are discussed below.

**Appointment and removal of trustees**

Notably, before the enactment of the 2024 Act, the Trusts (Scotland) Act 1921 only provided for appointing new trustees by deed of assumption and by the court. This practice made it very difficult for trustees to appoint new trustees and remove incapacitated trustees. However, the 2024 Act now provides for appointing a protector (i.e. a person to oversee the exercise by the trustees of their functions) by the trustor (i.e. testator) who can direct the trustees to assume an additional trustee or remove a trustee from office. Additionally, a trustor is granted the power to appoint a new trustee in circumstances where there is no capable trustee or a trustee is incapacitated.

---

5 2024 Act (n 1), ss 76–77.
6 ibid at s 88 (2).
7 ibid at s 88 (3).
10 Trusts (Scotland) Act 1921 (1921 Act), ss 21–22.
11 2024 Act (n 1), s 53 (1).
12 ibid at s 53 (3) (b).
13 ibid at s 53 (3)(a).
not traceable. Essentially, the power granted to a truster only applies to private-purpose trusts and cannot be exercised in a public trust. It is also not subject to the time of creating the private trust. It, therefore, follows that a Scottish truster of a public trust—for instance, a charitable trust—will not be able to appoint a protector. The logic behind this provision is that in public trust, the trustees are often expected to act in the best interest of a wider community. Therefore the appointment of new trustees is typically more regulated and overseen by external authorities to ensure transparency and accountability. Nevertheless, as provided under the 1921 Act, the court is empowered to appoint a new or an additional trustee when suitable for the administration of the trust.

More importantly, regarding the removal of trustees, the 1921 Act necessitates administrative delays and costly burdens for trustees to remove an incapacitated or absent trustee. Under the 1921 Act, a trustee who has become insane or incapable of acting due to a physical or mental disability, or who has been gone from the United Kingdom for a continuous period exceeding six months, can only be removed from office by a petition to the Court of Session’s nobile officium (i.e. noble office) brought by any co-trustees or an interested beneficiary/third party. Worst still, the court is only likely to grant such removal if there has been serious ‘malversation of office’ and the executor/trustee remaining in office would prevent, prejudice, or obstruct the execution of the trust. For instance in Wilson v Gibson, the court granted the removal of executors who had obstructed the administration of an estate by ignoring correspondence and refusing to sign documents resulting in administrative deadlock, while in Shariff v Hamid, the court established that the test in refusing to remove trustees was ‘whether on the facts there was something equivalent to, or as bad as, malversation of office’ and the executor/trustee remaining in office would prevent, prejudice, or obstruct the execution of the trust. Current case laws have also made clear that ‘the court will not be able to use its authority under section 23 of the 1921 Act in cases involving poor performance, negligent action, disputes amongst executors, or careless behaviour; rather, there must be a clear and present breach of fiduciary responsibility’. This accordingly sets a very high bar for co-trustees and interested third parties to remove an incapacitated trustee. Hence, there was a need to create some default rules that would seamlessly cover such eventualities.

Essentially, the Trusts and Succession (Scotland) Act 2024 addresses this long-standing administrative frustration concerning the removal of trustees. The Act empowers the majority of trustees to remove an incapacitable trustee, those convicted of an offence involving dishonesty, sentenced, or imprisoned for contempt of court. Also, where a trustee who is a member of a regulated profession (for example, a solicitor, accountant, financial adviser, or teacher) is no longer a member of the regulated profession in question or is no longer entitled to practise such...
profession, such a trustee could be removed by the majority of trustees without an order of the court.27

Similarly, the beneficiaries of a trust are authorised to remove a trustee provided the removal is agreed to by all the beneficiaries; they are up to the age of majority (i.e. 18 years and not 16 years of age of legal capacity in Scotland);28 and the trust property contains a secured trust purpose and an indemnifying right that can be preserved.29 It therefore follows that in the absence of a unanimous agreement by all the beneficiaries of the trust at the time of reaching such an agreement, attempted removal of a trustee will be ineffective.

It is worth noting that sections 7 and 8 of the 2024 Act still empower the Court to remove a trustee where they are incapable or untraceable, on grounds of unfitness to carry out the duties of a trustee, carrying out duties in a way that is inconsistent with their fiduciary duty, or where they have neglected their duties as trustees. However the term ‘fiduciary duty’ is not defined under the 2024 Act,30 hence further guidance will be taken from the common law perspective (i.e. the duty to act honestly, not to make any unauthorized profits from one’s position, and not to place oneself in a situation where one’s interests may conflict with those of the person to whom the duty is owed).31 Accordingly, it has been held in Children’s Investment Fund (UK) v Attorney General,32 that ‘the fiduciary duties owed by trustees (in that the member of the incorporated registered charity) are owed ‘to the charitable purposes or objects of the charity’. Therefore, the overriding duty of charitable trustees is to further the purposes of the charity’.33

Trustees’ Duty to Provide Information to Beneficiaries
As part of the authorization given to beneficiaries under the 2024 Act to decisively protect the beneficial interests in a trust estate, trustees have to provide information to beneficiaries as they deem appropriate in the circumstance to ensure that beneficiaries and potential beneficiaries are identified and traced.34 Also, by section 30(1) of the Act, trustees are further placed under a duty to disclose to a beneficiary or potential beneficiary information requested by them regarding the trust unless the trustees consider it ‘inappropriate’. The essence of these provisions is to foster transparency, accountability, and open communication between the trustees and beneficiaries.

However, based on the provision of section 29 of the 2024 Act, the level of information to be disclosed by the trustee ought to be based on what a trustee deems reasonably appropriate to disclose in the circumstance. Nevertheless, the view of a trustee regarding what is ‘appropriate’ or ‘inappropriate’ must be subject to the provision of the Trust Deed.35 This paper argues that in as much as the provision of sections 29 and 30 of the new Act helps to prevent trustees from requesting a reasonable fee for the disclosure of information, this provision could also give rise to varying interpretations and potential disputes. Nonetheless, to serve the intended purpose of this duty, section 30 (7) provides that trustees “will not ordinarily disclose information” relating to some beneficiaries or potential beneficiaries, reasons for their decisions, or letters of wishes.

Accordingly, it is therefore submitted that a community reading of sections 29 and 30 of the 2024 Act leaves beneficiaries and potential beneficiaries with some “limited” (and not an

27 Ibid at s 9 (2) (3).
28 Ibid at s 10 (b)(i); Age of Legal Capacity (Scotland) Act 1991 (as revised) 2012, s 1 (b).
29 Ibid at s 10.
30 2024 Act (n 1), s 32.
31 Bristol & West Building Society v Mothew (1998) Ch 1, 18; IT Human Resources Plc v Land (2014) EWHC 3812 (Ch); EWHC 3812 (Ch); Glenn v Watson (2018) EWHC 2016 (Ch), 131; Davies v Ford (2020) EWHC 686 (Ch).
33 Ibid, 50, 78 and 200.
34 2024 Act (n 1), s 29 (1) (3).
35 Ibid at s 30 (2) (a).
“absolute”) right to request information from trustees. This is because the grant of their request for information is subject to the provision of the Trust Deed and the discretion of the trustees regarding what they deem appropriate in the circumstance. Nevertheless, the disclosure of information by trustees is gradually becoming a recurring duty for trustees in the United Kingdom. For instance, a trustee in Scotland is required under the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2023 to provide information relating to the ownership of a trust land. A similar request is also required from UK Trustees under the HMRC Trust Registration Service Manual, to provide information relating to the beneficiaries and potential beneficiaries of the trust to the HMRC. Therefore, the requirement to disclose information to Scottish beneficiaries, although a new duty, would not be unfamiliar to Scottish trustees.

**Trustees’ Decision-Making and Investment Powers**

Under the 1921 Act, the decision-making of trustees is stifled by the quorum-based system. For instance, the 1921 Act requires that a valid grant of deeds by trustees should be done by a quorum of such trustees in favour of the person(s) in question. Also, this strict requirement is further exemplified in the appointment of new trustees. Trustees can only appoint new trustees when acting under the trust deed or by a quorum of such trustees.

However, with the enactment of the 2024 Act, the limitations of the quorum-based system have been addressed. Thus, decisions can be reached by a majority of trustees capable of making such decisions at the time, except when the trust deed, expressly or impliedly states otherwise. It therefore follows that the compulsory requirement of a quorum has been partly jettisoned in the new Act.

Further, the initial 1921 Act gave Scottish Trustees ‘limited’ powers in the management of trust properties. These were enlarged by the Charities and Trustee Investment (Scotland) Act 2005, which authorised trustees to make any kind of investment in the trust estate (including an investment in heritable property). The discretionary powers of trustees regarding the making of investment decisions are also recognized in the 2024 Act. In making an investment decision due consideration must be given to the suitability of the proposed investment to the trust and the need for diversification of investments of the trust.

Additionally, the 2024 Act widens the investment powers of trustees in Scotland by allowing them to take into account ‘appropriate non-financial considerations’ in determining which investment to make. Hence, in making an appropriate non-financial investment, consideration would be given to the ‘consistency of the investment with the purposes of the trust’ and the ‘ethical, social, or environmental’ implications. Nevertheless, it is worth noting that the ESG provision was not at Stage 1 of the Trusts and Succession (Scotland) Bill but was introduced at Stage 2. Flowing from this provision, it will therefore be rightly stated that Scottish trustees may consider ESG factors when making investment decisions. The provision of section 20 of...
the 2024 Act aligns with the case of *R (Palestinian Solidarity Campaign Ltd and Anor) v Secretary of State for Housing, Communities and Local Government*, where Lord Carnwath explained that “trustees may take non-financial considerations into account—provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision”. This provision also sits well with the modern practice of trust, and Scotland’s ambitious target to cut down greenhouse gas emissions and achieve net zero by 2045. This provision will enable Scottish trustees’ investment priorities to align with other global objectives.

However, it is significant to note that the new investment power of trustees in Scotland is exercisable at their “discretion” except when the trust deed, expressly or impliedly provides otherwise. Thus, it will be useful for testators in Scotland to expressly stipulate the ambit of the trustee’s investment powers in the trust deed to limit the avenue for trustees to make decisions based on their ethical perspectives. Nonetheless, pension trustees have their own trustees’ investment duties and powers under the Pensions Act 1995. While the powers under the new 2024 Act would only apply where they were exercised, this will not be the case for pension trustees who must fulfil the Pension Act 1995 requirements, and the Pensions Regulator General Code of Practice 2024.

**Trustees’ Standard of Care**

The new 2024 Act is also a clear departure from the 1921 Act which does not provide for a definite standard of care for Trustees. Under the new Act, the minimum standard of care for a trustee in Scotland is similar to a prudent person’s exercise in managing another’s affairs. The 2024 Act further distinguishes this “ordinary prudent person’s test” from the standard of care for a person who manages the affairs of a trust as part of his/her professional services. In the latter situation, the standard of care will be based on such skill, care, and diligence that is reasonably expected from a member of such a profession. Hence, it has been observed that “this differentiation ensures trustees are accountable commensurate with their expertise and professional responsibilities.”

However, the 2024 Act only provided for the standard of care of a trustee without providing a similar provision for ‘protectors’ and ‘supervisors (i.e. persons appointed by the trustor in a private trust to oversee the fulfilment of the trust’s specific purpose by the trustees).’ Nevertheless, considering the enormity of the roles of protectors and supervisors under the new Act, it would be rightly inferred that their standard of care would be that of an ‘ordinary prudent person’ except where they act in their professional capacity.
As identified above the Trusts and Succession (Scotland) Act 2024 also impacts succession in Scotland. The notable themes in the 2024 Act that will modify the practice of succession in Scotland are discussed below.

Succession Rights of Surviving Spouses and Civil Partners

Under the Succession (Scotland) Act 1964, where a person died intestate, the succession rights of the surviving civil partner are limited to their “Prior Rights”. Such partners could only inherit the residence in which they and the deceased lived, in addition to the furniture and plenishings up to a maximum value of £29,000 and a monetary payment of up to £89,000—contingent upon the existence of surviving children for the deceased. When there are surviving children, the remaining part of the estate is usually distributed first to the surviving children and grandchildren of the deceased and the balance to the deceased’s parents and siblings. It was only in the absence of a surviving child, parents, or siblings that a spouse or civil partner is entitled to inherit beyond their Prior Rights. This succession practice has been greatly criticised in Scotland because it was not in tandem with public opinion and was against the interest of surviving spouses without children. Hence, the only way in which testators managed this position was by making a Will.

However, with the new 2024 Act, the order of priority has been changed to be more inclusive, so that the surviving civil partner/spouse can inherit the remaining estate after the deceased’s children or grandchildren. Thus, if a person dies intestate and without any child, the entire estate would be inherited by the surviving civil partner/spouse. The new 2024 enactment has provided a more equitable precedence to the surviving spouse or civil partner in the event of an intestacy.

The only medium for the owners of estates to effectuate their desires regarding the disposal of their proprietary rights is by making a Will. Other than this, the current default position which is in tandem with public policy will prevail.

Right of Survivorship in Divorce, Dissolution, or Annulment

The survivorship clause is a formal legal clause that could be included in a co-ownership—where co-owners own in common and each has a separate pro indiviso share—in Scotland. Under Scots Law, before the enactment of the Succession (Scotland) Act in 2016, where a property is co-owned by a couple, the doctrine of survivorship was not affected by their divorce, dissolution, or annulment. In other words, by the survivorship destination clause, a surviving divorced spouse or civil partner could automatically inherit the title of a property that was jointly owned with their ex-partner without any further legal intervention. However, with the Succession (Scotland) Act 2016, this practice no longer holds sway—meaning a surviving

---

60 £50,000 if the deceased had children and £89,000 if the deceased did not have children. It is also worth alluding that furniture and plenishings were previously £24,000 and (if there were no children) the maximum monetary sum was £75,000.
61 Succession (Scotland) Act 1964, s 2 (1) (c) (d).
64 2024 Act (n 1), s 77.
65 Ibid.
66 Charles (n 55), 25.
67 2024 Act (n 1), s 77.
68 Succession (Scotland) Act 2016, ss 35; 37–39; Magistrates of Banff v Ruthin Castle Ltd (1944) SC, Lord Cooper.
69 Ibid.
spouse/civil partner no longer has any rights to the deceased’s half-share, unless the title document expressly provides that succession to the property is to be unaffected by their marriage or civil partnership being terminated. More importantly, the Trusts and Succession (Scotland) Act 2024 has further clarified the effect of divorce, dissolution, or annulment on survivorship clauses. Thus, reiterating the change to the law in 2016.

As discussed in the prelude of this paper, aside from the enactment of the Trusts and Succession (Scotland) Act 2024, the Scottish Government is proposing sweeping changes to the Housing system in Scotland. The Housing (Scotland) Bill 2024 presents an opportunity to revolutionize rent, rent control areas, eviction procedures, and homelessness in Scotland. This paper shall take a turn to reflect on the implications of the housing Bill on the Scottish people.

CRITICAL REFLECTION ON THE HOUSING (SCOTLAND) BILL 2024

The Housing (Scotland) Bill 2024 brings further amendments to the Housing (Scotland) Act 1987 which governs homelessness (those lacking a home to stay and those threatened with such lack in the future); the Housing (Scotland) Act 2001 which regulates local authorities (i.e. councils) and registered social landlords (i.e. housing associations); and the Private Housing (Tenancies) (Scotland) Act 2016 which regulates private residential tenancies (PRTs). It is also worth noting that in addition to the impact of the proposed Housing Bill, the Cost of Living (Tenant Protection) (Scotland) Act 2022 also protects private residential tenants from increases in rent and evictions, its final measure on ‘rent adjudication’ is scheduled to expire on 31 March 2025 because the Cost of Living Act 2022 was a transient legislation passed as an emergency bill. This is similar to France’s trêve hivernale which led to a partial eviction winter truce (ban) in France and has been extended to 31 March 2024. Essentially, some notable provisions of the proposed 2024 Bill and their potential implications for the Scottish people shall be analysed below.

Rent Control Areas and Rent

The Private Housing (Tenancies) (Scotland) Act 2016 provided for ‘rent pressure zones’ (RPZ) which is similar to the proposed rent control areas (RCA), to mitigate rent increases. However, the RPZ was not fully utilised and is now to be replaced with the RCA. As Combe observed:

It is RIP RPZs, and we barely even knew you. Rent pressure zones never existed in the wild, and the framework for them is now to be replaced by a framework for rent control areas... given there was never a successful RPZ it is difficult to offer anything other than pure speculation as to whether this was the best approach.

---

71 Succession (Scotland) Act 2016, s 2 (3) cf Family Law (Scotland) 2006, s 19 which first introduced the evacuation of destination by creating the fiction that the surviving ex-spouse had not survived the deceased.
73 Housing (Scotland) Bill 2024, SP Bill 45, Session 6 (2024) (hereinafter called 2024 Bill), s 55; schedule.
74 Cost of Living (Tenant Protection) (Scotland) Act 2022, preamble; ss 1-2; schs 1-2.
77 Private Housing (Tenancies) (Scotland) Act 2016 (2016 Act), ch 3, ss 35–43.
78 2024 Bill (n 72), ch 1, ss 1–18.
It has been argued that one of the reasons why the local authorities did not utilise the RPZ safeguard since its introduction in 2016 was because ‘the Private Housing (Tenancies) (Scotland) Act 2016 needed to take cognisance of the increase in the Consumer Price Index (CPI)’.80 Also, “the three percent cap set by the Scottish Government under the Cost of Living (Tenant Protection) (Scotland) Act 2022 has been lower than CPI in recent years – for instance, the Office of National Statistics (ONS) report shows that the CPI rose by 8.7 percent in the 12 months preceding May 2023”81 and more recently, the “CPI including owner occupiers’ housing cost rose by 3.8% in the 12 months to March 2024”.82 Therefore, the three percent cap was insufficient to cover landlords’ rising mortgage interest rates and the inflationary impact on the cost of repairs and maintenance. However, it is worth noting that “when the RPZ was implemented in 2016, the CPI was less than 1 percent at the time and any rent increase a landlord would have requested could have been quite small”.83 It, therefore, appears that the Scottish Government abandoned its objective of utilising the RPZ and put more obstacles in the way for landlords to overcome when times were tight through the Cost of Living (Tenant Protection) (Scotland) Act 2022.

Nevertheless, the 2024 Bill requires a local authority (LA) to assess the amount of rent due as well as the rent increases under ‘relevant tenancies’ (private residential tenancy or an assured tenancy of six months or more in terms of the Housing (Scotland) Act 1988) within its jurisdiction and to submit its first report to Scottish Ministers by 30 November 2026.84 The report would also state whether or not a LA recommends ‘all or any part of the area of the local authority’ as a rent control area, while further reporting would be made every five years or subject to regulations.85 Based on the reports, an area will be designated as an RCA if the Scottish Ministers are satisfied that it is “necessary and proportionate to protect the social and economic interests of tenants in the area and control of landlords’ use of their property in the area”.86 However, this must be preceded by due consultation with the relevant parties (i.e. representatives of the local authorities, landlords, and tenants under the relevant tenancies of properties in the proposed rent control area).87

The potential implication of RCAs to landlords and private residential tenants in Scotland is that the rent payable by private residential tenants in areas that are designated as RCA excluding “exempt property” will be pegged at a ‘specified percentage (which may be 0%)’, an amount falling within a specified range, or an amount calculated based on one or more specified factors, or other specified criteria’.88 Also, areas designated as RCAs will remain so for five years from the time of their designation, “unless they are revoked before the expiry of the period”89 Regarding the exclusion of ‘exempt property’ in RCAs, it has been suggested that such properties may include “landlords, who only own one property (or at least they only own one property they don’t live in) while for a tenant-related circumstance, it may include students in full-time education who are not renting directly from their education provider or a purpose-built student accommodation provider”.90

---

81 Ibid.
83 Citylets (n 80).
84 2024 Bill, ss 1 (1)(2)(a) and (5).
85 Ibid at ss 1 (2)(b); 2; 9(1).
86 Ibid at s 9(2).
87 2024 Bill, s 10.
88 Ibid at s 9(3) (5).
89 Ibid at s 9 (4).
90 Combe (n 79).
On the flip side, it is also essential to balance the competing interests between landlords and tenants to incentivise landlords, and stimulate property developers in the rental market. Thus, the regulation that will be made under the Bill should include ‘newly built homes’ as an ‘exempt property’ in RCAs to propel more supply of homes which will aid in addressing the potential housing crisis in Scotland. Acting otherwise may trigger the experience of Ireland’s tenants in Scotland—Ireland which has similar measures, now experiences reduced real estate investment and more landlords leaving the sector, leading to higher costs for tenants. As Combe puts it “One regular critique of rent control is that it might stifle development (…) but if you can allow new construction to at least not be disincentivized for any given tenure then housing supply can increase in a suitably balanced way.” The inclusion of ‘newly built homes’ as part of the ‘exempt property’ will also help to allay the fears of critics who believe that the 2024 Housing Bill is a “disappointment for those seeking to build new rental homes and that investors in the new modern build to rent sector … will remain uncertain of what the future rent control system will look like until potentially late in 2026”.

Furthermore, the 2024 Bill will also prevent landlords in RCAs from increasing rents between tenants in joint tenancies. Thus, the current practice whereby landlords hike up the rents of other flatmates whenever a tenant leaves a property will be curbed. This is because landlords will only be able to increase rents once a year as controls will be tied to the property, not the tenancy. Similarly, the Bill prevents tenants from being trapped in a joint tenancy they no longer wish to be part of. It allows one tenant to give notice to end the tenancy for all tenants after a two-month consultation period. However, joint tenants who wish to remain in the property could negotiate terms for a new tenancy with the landlord.

The 2024 Bill also empowers LAs to seek information from landlords and tenants. To ensure greater transparency in the Scottish rental sector and provide tenants an opportunity to challenge unfair rent increases, registered landlords will be required to state how much they are renting their property, the date on which the rent was last increased, how many rooms are in the property and surface area, etc. Failure to disclose such information within 28 days of receiving the request attracts a maximum fine of £1000. It has however been contended by Livingrent that the fine of “£1000 is very low when we consider that it could mean that they are unlawfully charging hundreds of pounds more in rent than they should be able to.”

Aside from the above contention, the request for information only focuses on rent and does not include information concerning the habitability and fitness of the property—for instance,

---

92 2024 Bill, ss 9 and 13.
94 Combe (n 79).
95 Martin Bennett, ‘Housing (Scotland) Bill 2024’ (Harper Macleod LLP, 29 April 2024) < Housing (Scotland) Bill 2024—Harper Macleod LLP> accessed 30 April 2024.
96 Living Rent, ‘The Scottish Government Finally Published the Housing Bill! Here Are Our Thoughts’ (LIVINGRENT, 28 March 2024) <https://www.livingrent.org/the_scottish_government_finally_announced_the_housing_bill> accessed 24 April 2024.
97 2024 Bill, s 14.
99 2024 Bill, s 15.
100 Ibid at s 16.
101 LivingRent (n 96).
is the property free from serious health and safety hazards including damp and mould?\textsuperscript{102} Generally, a landlord letting a property is expected to comply with certain building standards but not all landlords do.\textsuperscript{103} Undoubtedly, some landlords ‘may’ hide under the facade of the cavea\-\textit{t}ent\textsuperscript{\textit{a}} tenant (tenant beware) principle to exclude themselves from disclosing such latent defects. If landlords do not make such disclosures, how can tenants gain value for their rent? Experience shows that a few landlords would always repaint damp and moulds on walls to rent such properties to unsuspecting tenants—a few weeks after painting—in spring or summer, only for the tenant to become aware of the state of the rented property during winter when the walls are wet. With the contemporary shift from the common law cavea\-\textit{c}emptor to cavea\-\textit{v}enditor (purchaser beware) in property purchase,\textsuperscript{104} section 15 of the 2024 Bill is an avenue to significantly align the disclosure of information in Scottish PRTs in tandem with international best practices on disclosure,\textsuperscript{105} by shifting from the cavea\-\textit{t}ent\textsuperscript{\textit{a}} tenant to cavea\-\textit{v}enditor (landlord beware) principle.

Aside from the above discussions on RCAs and rent, the proposed Housing Bill also has a biting effect on eviction procedures in Scotland.

\textbf{Eviction Process}

In recent times, the eviction of a tenant under Scottish law has been an uphill task, especially with the enactment of the Cost of Living (Tenant Protection) (Scotland) Act 2022 which between 6 September 2022 and 31 March 2024 had placed a moratorium on the eviction of tenants in the private and social rented sectors, as well as student accommodation.\textsuperscript{106} Although, the moratorium was not applicable in circumstances where the tenants owed substantial rent arrears, engaged in antisocial or criminal behaviour, abandoned the property, or were evicted because the landlord no longer employed them.\textsuperscript{107} With the end of the moratorium on 1 April 2024 and the prior end of the ‘no-fault’ eviction rules in Scotland,\textsuperscript{108} the 2024 Bill now contemplates changing how to calculate damages for enforcing illegal evictions and delays in issuing eviction orders. Essentially, the Bill places a duty on the First-tier Tribunal—the court for private sector tenancies,\textsuperscript{109}—and the Sheriff court—the court for social renters—\textsuperscript{110} to consider the need for a delay before granting an eviction order.

Under the 2024 Bill, the First-tier Tribunal and the Sheriff Court are required to consider “whether the grant of an eviction order without a period of delay would not cause the tenant or a member of the tenant’s household to encounter financial hardship, detrimental health effect or detrimental health effect occasioned by the person’s disability”\textsuperscript{111} In the same vein, to balance the interest of Scottish landlords, the Bill also requires the Tribunal to consider “whether the


\textsuperscript{103} Ibid.


\textsuperscript{106} Cost of Living (Tenant Protection) (Scotland) Act 2022 (2022 Act), part 1, s 2; sch 2; With the end of the moratorium, Scottish PRTs will have to rely on the provision of the Housing (Scotland) Act 1988 for unlawful evictions until the 2024 Bill is passed.

\textsuperscript{107} 2022 Act, sch 2, s 1(4)(5).

\textsuperscript{108} Private Residential Tenancy (PRT) agreements 2017; Private Housing (Tenancies) (Scotland) Act 2016, pt 1, s 1.

\textsuperscript{109} 2024 Bill, ss 24, 26, and 27 which respectively amends 2016 Act, s 51; Housing (Scotland) Act 1988, s 20 and Rent (Scotland) Act 1984, s 12.

\textsuperscript{110} 2024 Bill, s 25 amends Housing (Scotland) Act 2001, ss 16 and 17.

\textsuperscript{111} 2024 Bill, ss 24 (2), 25 (2), 26(2).
grant of an eviction order with a period of delay would not cause the landlord or a member of the landlord’s household to experience financial hardship, detrimental health effect or detrimental health effect occasioned by the person’s disability”.\(^{112}\)

The above provisions demonstrate the desire of the draftsmen to balance the conflicting interests of landlords and tenants in Scotland. However, what will be the position of the Tribunal or the Sheriff if in one case the grant of an evicting order without delay could be detrimental to the tenant and in the same case the grant of an evicting order with a delay could cause the landlord or a member of the landlord’s household to suffer any detriment? In such a scenario, the court will be swayed by the preponderance of evidence in determining the party to benefit from the pendulum swing.\(^{113}\)

In addition to the above considerations, the 2024 Bill also introduced a new consideration called “seasonal factor” which could contribute to financial hardship or detrimental effect on the tenant or a member of the tenant’s household in circumstances where an eviction order is granted without a period of delay. However, the Bill does not provide a precise definition of “seasonal factor”. It has been noted that a clue could be taken from the Explanatory Notes to the Bill which only offers some clarifications in the context of the First-tier Tribunal.\(^{114}\) Nevertheless, it is worth noting that the 2024 Bill does not review the grounds for eviction.\(^{115}\)

Furthermore, regarding illegal evictions, the 2024 Bill took a leaf from the Cost of Living (Tenant Protection) (Scotland) Act 2022 which required any court or first-tier tribunal always to notify the Police Scotland, Scottish Housing Regulator, or other relevant local authorities when making an order awarding damages to a former residential occupier for illegal evictions.\(^{116}\) The logic behind this provision is to enforce the court’s order, prevent further illegal actions, protect the tenant’s rights, ensure good record keeping, and deter other landlords who might consider unlawful eviction. Hence, akin to the 2022 Act, the 2024 Bill seeks to amend sections 36 and 37 of the Housing (Scotland) Act 1988 regarding notification and damages for illegal evictions.\(^{117}\)

Under the 2024 Bill damages awarded by the courts or tribunals are to be determined based on the amount of the former residential occupier’s monthly rent—between 3 and 36 months—depending on what the court or tribunal considers appropriate in the circumstance (considering the manner of the unlawful eviction and the impact on the former residential occupier).\(^{118}\) This provision therefore amends the regime that ensures that tenancies created by oral agreements are protected from illegal eviction in Scotland despite their mode of creation.

**Homelessness**

Part 5 of the 2024 Bill would amend the Housing (Scotland) Act 1987 and the Housing (Scotland) Act 2001. The Bill seeks to codify what Homeless Network Scotland would describe as the “Ask and Act” duties “which will make preventing homelessness in Scotland a shared responsibility across the public sector”.\(^{119}\) The Bill proposes duties on relevant authorities (public authorities)—local authorities (councils), Police Scotland, health service providers, registered social landlords, and Scottish Ministers (in their capacity relating to prisons and young

\(^{112}\) Ibid.


\(^{115}\) LivingRent (n 96).

\(^{116}\) 2022 Act, Sch 2, s 7; 2024 Bill, s 28 (2).

\(^{117}\) 2024 Bill, s 28 (2)-(3).

\(^{118}\) Ibid at s 28 (3).

offenders institutions and those persons detained in such places)—to ensure people do not become homeless.\textsuperscript{120} The relevant authorities are to do this by assessing a person’s needs while exercising their functions, to determine if a person is homeless or threatened with homelessness.\textsuperscript{121} This proposal would change the narrative from the practice of crisis intervention to the prevention of homelessness and threatened homelessness in Scotland.\textsuperscript{122}

Unlike the current position that only requires a person impacted by homelessness or threatened homelessness to make an application to the local authority (LA),\textsuperscript{123} the 2024 Bill empowers the relevant authorities charged to ‘ask and act’ to make an application on behalf of an affected person.\textsuperscript{124} Also, the duration within which a person can be classified as being threatened with homelessness will be increased from the current two-month period\textsuperscript{125} to six months once the Housing Bill is signed into law.\textsuperscript{126} This will benefit homeless applicants and those threatened with homelessness in Scotland more.

Further, in cases where the LA “is not satisfied that an applicant became threatened with homelessness intentionally” (i.e. unintentionally threatened with homelessness),\textsuperscript{127} the current duty of the LA is to “take reasonable steps to secure that accommodation does not cease to be available for occupation”.\textsuperscript{128} But under section 41 (4) of the 2024 Bill, the LA is required to take reasonable steps to “remove or where not possible, minimise the threat of homelessness and secure that accommodation is available for occupation by the applicant”.\textsuperscript{129} This new duty is also supplemented by the requirement for the LA “to secure that the applicant retains the accommodation occupied by the applicant when the application is made”,\textsuperscript{130} and to ensure that other accommodation is available for occupation by the applicant if that accommodation will not continue to be available for the applicant’s occupation.\textsuperscript{131} The LA could also grant “advice and assistance to the applicant where it deems appropriate for (a) removing or minimising the threat of homelessness concerning the applicant and (b) securing that accommodation continues to be, or is otherwise, available for occupation by the applicant”.\textsuperscript{132} Hence, the duty in section 41 (4) of the 2024 Bill is unlike the current duty which only requires local authorities “to take reasonable steps that accommodation does not cease to be available for occupation”.\textsuperscript{133}

Conversely, in cases of “intentional homelessness”,\textsuperscript{134} the 2024 Bill requires the LA to provide advice and assistance to the applicant to ensure that accommodation “continues to be, or is otherwise, available for occupation by the applicant”.\textsuperscript{135} This is unlike the current provision which requires the LA to grant “advice and assistance to the applicant to ensure that accommodation does not cease to be available for his occupation”.\textsuperscript{136}

\textsuperscript{120} 2024 Bill, s 41 (7).
\textsuperscript{121} Ibid at s 41 (6); proposed new Housing (Scotland) Act 1987, ss 36A—36D.
\textsuperscript{122} Ibid at part S.
\textsuperscript{123} Housing (Scotland) Act 1987, s 24.
\textsuperscript{124} 2024 Bill, s 41 (6) amends the Housing (Scotland) Act 1987, s 36 by including s 36C(2).
\textsuperscript{125} Housing (Scotland) Act 1987, s 24 (4).
\textsuperscript{126} 2024 Bill, s 41 (2) (b) cf. Homelessness Reduction Act 2017 (England and Wales), s 1(2)(3); 13(3) and Housing Act 1996 (as amended), s 175 (4) (5) which provides for 56 days—2 months—in England and Wales.
\textsuperscript{128} Housing (Scotland) Act 1987, s 32 (2).
\textsuperscript{129} 2024 Bill, s 41 (4).
\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid at s 41 (4).
\textsuperscript{132} Ibid.
\textsuperscript{133} Housing (Scotland) Act 1987, s 32 (2).
\textsuperscript{134} Matthew Hutchings, ‘Haile v Waltham Forest LBC—Intentional Homelessness, Queue Jumping and the ‘I would have been homeless anyway’ argument’ 18(6) J Housing Law 116–119 (2015).
\textsuperscript{135} 2024 Bill, s 41 (4).
\textsuperscript{136} Housing (Scotland) Act 1987, s 32 (3).
Given the suspension of the local connection referral in 2022, the 2024 Bill does not permit Scottish LAs to refer a homeless applicant to another LA that an applicant is locally connected to in Scotland. Scottish LA can still make referrals to the LAs in England or Wales. However, by the proposed section 33 (7) 1987 Act, where an application has not been made by the applicant personally but through any relevant authorities as discussed above, a Scottish LA will not be allowed to refer such application to the LAs in England and Wales. This change in the 2024 Bill would stop English LAs from picking up a duty that would not otherwise exist.

More interesting is the fact that the 2024 Bill seeks to protect social tenants affected by domestic abuse. The Bill requires that social landlords must during the selection of tenants give preference to would-be tenant(s) where it is probable that such person(s) continuous occupation of their current property will lead to abuse—irrespective of the source of the abuse. The Housing Bill intends to set out new guidelines for recovery of possession in social housing. Social landlords must notify their tenants regarding the grounds for recovering possession. In cases where the ground concerns arrears of rent and the social landlord considers that the arrears are ‘fully’ or ‘partly’ because the tenant has “experienced or is experiencing domestic abuse”, the social landlord must “take such action to support the needs of the tenant arising in connection with the rent arrears as the landlord considers reasonable having regard to its domestic abuse policy” and must “provide the tenant with details of such other support that may be available to the tenant concerning domestic abuse as the landlord considers appropriate in the circumstances”. Additionally, the social landlord is required to prepare a “domestic abuse policy” for such a tenant to prevent the tenant from homelessness. These actions constitute pre-action requirements that a social landlord must meet before commencing an action to recover possession based on rent arrears under the 2024 Bill.

Nevertheless, despite the laudable nature of these pre-action requirements, fulfilling these requirements will be contingent on the social landlord’s “consideration” that the tenant’s rent arrears have been occasioned ‘fully’ or ‘partly’ by domestic abuse. Pragmatically, this “reasonable consideration” will depend on the level of information at the disposal of the social landlord concerning the tenant—preceding the commencement of the recovery action. Hence, some level of disclosure may be required on the part of the tenant for these pre-action requirements to be triggered against the social landlord.

CONCLUSION

Flowing from the tenor of this paper, it is self-evident that a fairer, well-regulated sector is good for all—testators, beneficiaries, trustees, tenants, homeless, and landlords. This paper has underscored how Scotland has led and intends to improve the proprietary and beneficial rights of the Scottish people. On a larger scale, these legislative reforms will also be significant across the Property Law regimes in other parts of the United Kingdom—England, Wales, Northern Ireland—and other jurisdictions due to their attendant implications for the Scottish people and the possibility of addressing global challenges in trusts administration, succession, and housing.

137 Homeless Persons (Suspension of Referrals between Local Authorities) (Scotland) Order 2022, arts 1 (1) (2).
138 Ibid; 2024 Bill, s 41 (5) cf. Housing (Scotland) Act 1987, s 33.
139 2024 Bill, s 41 (5).
140 Ibid at ss 43–45.
141 Ibid at s 43 (2); Housing (Scotland) Act 1987, s 20. Accordingly, the definition of ‘abuse’ under section 2 of the Domestic Abuse (Protection) (Scotland) Act 2021 is given an expansive meaning to include domestic abuse by a partner or former partner.
142 2024 Bill, s 44 (2).
143 Ibid.
144 Ibid.
145 Ibid at s 45.
The Scottish Property Law reforms herald a good sign for trust law, succession, tenancy, and homelessness in Scotland. The 2024 Act gives greater flexibility to deal with *doli incapax* (persons incapable of committing an offence) trustees without delaying the ongoing administration of trusts. Its succession provisions are more inclusive and align with contemporary perspectives on fairness.

Conversely, the 2024 Housing Bill seeks to provide a fair balance between protection for tenants and the rights of landlords. It also provides reforms that will ensure that the inhabitants of Scotland have a safe, secure, and affordable place to live while contributing to the ambition of ending homelessness in Scotland through the ‘ask and act’ approach. These property law reforms underscore the need for continuous monitoring and restructuring of the laws to meet current-day socio-economic exigencies.

Nevertheless, these legislative reforms are by no means silver bullets and do not guarantee that the conflicting interests between parties in a “trust” or “property transaction” will all be addressed. As argued, it would be ideal to expand the disclosure band under section 15 of the 2024 Bill to require landlords to provide information relating to the health and safety hazards in their rented properties to give tenants more value for their money. Also, it will be useful to include newly built homes as “exempted property” under sections 9 and 13 of the proposed Bill. In the same vein, while RCAs, unlike the Cost of Living (Tenant Protection) (Scotland) Act 2022, are not all-encompassing prohibitions or regulations, they may, when applied wisely unlike the dormant RPZ, shield local authorities or those living in the poorest areas from the effects of rent increase. Overall, these actions will ensure that the 2024 Bill properly tackles homelessness, assists renters, and encourages affordable home building in Scotland.